AFFIN BANK BHD

v.

DATUK AHMAD ZAHID HAMIDI

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-1011-2001]
1 JANUARY 2005

CIVIL PROCEDURE: *Judgment - Final judgment - Triable issues - Overdraft facilities secured by shares - Repayment - Sale of shares - Sale of shares not disclosed to defendant - Whether guilty of non-disclosure - Whether in breach of duty of care - Whether summary judgment improperly granted - Rules of the High Court 1980, O. 14*

In 1995 and 1996, the plaintiff bank had granted overdraft facilities to the defendant upon the security of certain shares ('the shares') deposited by the defendant with the plaintiff. On 2 December 1998, the parties agreed that the plaintiff would liquidate the shares through a firm known as AMS, and apply the proceeds thereof towards the principal sum outstanding ('first collateral agreement'). On 3 March 2000, the plaintiff informed the defendant that it would not dispose off the shares through AMS, but through its subsidiary instead. Subsequently, at a meeting on 22 August 2000, the parties resolved that the plaintiff would dispose all the shares held by it, and would further consider the defendant's request for a rebate of the interest ('second collateral agreement'). It was undeniable that had the plaintiff then disposed all the shares (pursuant to the second collateral agreement), the proceeds obtainable would have been sufficient to repay the principal sum owing to the plaintiff. This the plaintiff however did not do. Be that as it may, the subsequent sales of the shares failed to satisfy the owing sum, and the plaintiff sued the defendant for RM12,936,730.74 together with interest and costs. The plaintiff then applied to the learned registrar for and obtained summary judgment in respect of the claim. In this appeal by the defendant against the said registrar's decision, issues arose as to whether triable issues had been proved, and hence whether the order for final judgment herein had been properly granted, when: (i) the plaintiff gave no notice to the defendant as to the particulars of the sale transactions of the shares it had undertaken; (ii) one of the facilities was granted merely to enable the defendant to service the interest accruing on the other overdraft facilities; and (iii) the certificate of indebtedness relied upon by the plaintiff was excessive and erroneous.

Held (allowing the defendant's appeal):

[1] The plaintiff had breached its obligations under the first and second collateral agreements thereby causing the defendant to suffer loss and damage. In the circumstances, these two collateral agreements constituted triable issues that should go for trial. (pp 527 g & 529 h-i)

[2] From 7 December 1998 to 23 February 2001, the plaintiff had disposed almost 2.96 million units of shares which the plaintiff held as security. Surprisingly, this fact was not disclosed until the plaintiff was put to strict proof thereof. The plaintiff was therefore guilty of non-disclosure. (p 530 a-e)

[2a] In the plaintiff's final affidavit in encl. 9, the plaintiff finally made disclosure of the sale of approximately 2.96 million units of the shares. In contrast, in the plaintiff's first affidavit in encl. 5, as well as in the plaintiff's statement of claim, the plaintiff had consistently maintained that none of the shares were ever sold. There was thus a conflict of material evidence on the face of the plaintiff's very own affidavits. Such serious conflicts of material facts gave rise to triable issues that merit a trial. (p 530 e-h)

[2b] The plaintiff, at the instruction of the defendant, had settled the account of one Abdul Majid Omar with Arab-Malaysian Merchant Bank Bhd amounting to RM4,003,150.68, which account was secured by shares held by Abdul Majid Omar on trust for the defendant. The plaintiff did not disclose these facts for the purpose of its final judgment application and even denied being in receipt of the said shares. Clearly, pending further enquiry and disclosure by the plaintiff, it was impossible to determine what had happened to these shares. This was a triable issue fit for adjudication. (p 533 a-d)

[3] The defendant had challenged the certificate of indebtedness and so the plaintiff was duty bound to prove the same to court. This the plaintiff failed to do. It was also clear that the alleged indebtedness as set out in the certificate of indebtedness was inaccurate, manifestly erroneous and excessive. Final judgment therefore ought not to be accorded to the plaintiff. (p 532 d-h)

[4] The plaintiff was in breach of reg. 28 of the Bank Negara Malaysia guidelines when it granted the fourth overdraft to the defendant to enable the latter to service the interest in respect of his other accounts with the plaintiff. The guidelines are issued pursuant to s. 126 of the Banking and Financial Institutions Act 1989 ('BAFIA") and therefore has the force of law. And, as to whether s. 25 of BAFIA is applicable to the facts of the present case, it must remain an issue of law to be determined at the trial proper. (p 533 e-g)

[5] The plaintiff had breached its duty of care to the defendant. If the plaintiff had acted on the second collateral agreement and disposed off the shares on 22 August 2000, the amount outstanding today would only be a fraction of the claim. In fact, if there had been such a disposal, the moneys obtained would have extinguished the defendant's debt in principal to the plaintiff. Consequently, this was not a fit and proper case for summary judgment. (pp 534 d & 535 f-g)

Case(s) referred to:

Abdul Rahim Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors [2000] 2 CLJ 457 CA ***(refd)***

Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 CA ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Eushun Properties Sdn Bhd & Ors v. MBf Finance Bhd [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104 SC ***(refd)***

Miles v. Bull [1968] 3 All ER 632 ***(refd)***

Oriental Bank Bhd v. Jaafar Sidek Mohd Salam & Ors [1990] 2 CLJ 72; [1990] 2 CLJ 585 HC ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 126

Evidence Act 1950, s. 92

Rules of the High Court 1980, O. 14

For the plaintiff - Dahlia Lee Wooi Mien (Juelle Oh Guat Ling); M/s Shook Lin & Bok

For the defendant - Prem Ramachandran; M/s Sri Ram & Co

Reported by WA Sharif

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was the defendant's appeal by way of a notice of motion in encl. 10 against the whole of the decision of the learned senior assistant registrar ("SAR"). The appeal by the defendant was against the order for final judgment. I heard the submissions of the parties and I allowed the defendant's appeal in encl. 10 with costs. The defendant then withdrew encl. 14 which was the defendant's application for stay pending the disposal of the appeal in encl. 10. The plaintiff had no objection to the withdrawal of encl. 14 and I, accordingly, struck off encl. 14 without costs.

My reasons for allowing the defendant's appeal in encl. 10 with costs are as follows:

The Plaintiff's Claim

By way of encl. 4, the plaintiff's claim against the defendant was for the sum of RM12,936,730.74 as at 31 March 2001 together with interests and costs. The plaintiff's claim was for monies, allegedly due, by the defendant under four separate overdraft facilities. The details of the overdraft facilities may be stated as follows:

(a) an overdraft dated 6 July 1995 for RM500,000 (hereinafter referred to as "OD1");

(b) an overdraft dated 13 March 1996 for RM5.25 million (hereinafter referred to as "OD2");

(c) an overdraft dated 10 April 1996 for RM1.0 million (hereinafter referred to as "OD3"); and

(d) an overdraft dated 4 September 1996 for RM12.3072 million (hereinafter referred to as "OD4").

The overdraft facilities were, at all times, secured by the deposit of the following shares:

(1) 1,500 lots of Kretam Holdings Berhad shares;

(2) 3,846 lots of Ramatex Berhad shares; and

(3) 1,200 lots of Tekala Corporation Berhad shares.

All these shares will hereinafter collectively referred to as "the shares".

The Defence

Under this category, the defendant advanced triable issues and they may be stated in this way.

The First Meeting

On 2 December 1998, the defendant met two of the plaintiff's representatives in the persons of Mr. Khalil and Mr. Mohd Azlam to discuss the manner in which the defendant would settle his account with the plaintiff. At that meeting, it was agreed that (hereinafter referred to as "the first collateral agreement"):

(i) the defendant would dispose off the shares held by the plaintiff as security and apply all monies derived therefrom towards the principal outstanding;

(ii) there was no specific time frame fixed for the disposal of the shares;

(iii) the plaintiff would consider a reduction on interest; and

(iv) the disposal of the shares were to be done by way of private arrangement through Arab-Malaysian Securities Sdn Bhd ("AMS").

Five days later, and this was on 7 December 1998, the defendant wrote three separate letters to the plaintiff stating categorically the sale of the shares by private arrangement through AMS.

Nine days later, and this was on 16 December 1998, AMS wrote a letter to PAB Nominees (Tempatan) Sdn Bhd stating that the shares were to be sold by private arrangement through AMS.

Ten days later, and this was on 26 December 1998, the plaintiff wrote to the defendant and stated that the defendant's request for a 50% rebate will only be considered upon disposal of all the shares.

Thus far, the existence of the first collateral agreement can never be doubted.

But, on 3 March 2000, the plaintiff wrote to the defendant informing him that effective from 15 March 2000 the plaintiff will proceed to melt down the shares through one of its subsidiary companies called Affin-UOB Securities Sdn Bhd and that all the instructions pertaining to the sale of the shares would be done at the plaintiff's sole discretion. It must be observed that there was no reason for the plaintiff to put the defendant on notice unless the plaintiff was aware of the first collateral agreement dated 2 December 1998 and that such an inference must be drawn to that effect. It would be reasonable to infer that the only reason the plaintiff wrote the letter containing the notice was because the first collateral agreement was in place.

By letter dated 9 March 2000, the defendant then replied to the plaintiff's letter dated 3 March 2000. Through that letter the defendant informed the plaintiff that the sale of the shares will have to be done by way of a private arrangement through AMS as previously agreed.

It is interesting to note and it must be emphasised that on 8 March 2000 and again on 20 July 2000, the plaintiff called for a meeting with the defendant together with Mr. Khalil and Mr. Mohd Azlam. Even the manager of the Subang Jaya branch – a Mr. Yap Ghee Choo, has indicated that he would be attending the meeting to discuss the defendant's account with the plaintiff.

The Second Meeting

On 22 August 2000, at the request of the plaintiff, the defendant again met with the plaintiff's representatives to discuss the defendant's account. Mr. Khalil and Mr. Mohd Azlam attended the meeting. Mr. Yap Ghee Choo failed to attend the meeting. At this meeting, the parties agreed that the plaintiff would liquidate the shares held by it immediately in order to fully settle the principal amount due to the plaintiff. The only issue left outstanding was the rebate on the interest charged by the plaintiff. Despite the agreement pertaining to the sale of the shares held by the plaintiff to be conducted by the plaintiff, yet the plaintiff failed and/or neglected to dispose off those shares and this has caused the defendant to incur severe financial loss and hardship because the shares are currently worthless as compared to the price that it would fetch in August 2000.

As a matter of interest, the following factual matrix should be stated accordingly.

On 3 December 1998, the shares held by the plaintiff were valued at the following prices:

(1) Kretam Holdings Berhad shares valued at RM2.80;

(2) Ramatex Berhad shares valued at RM3.680; and

(3) Tekala Corporation Berhad shares valued at RM1.950.

On 29 August 2000, the shares held by the plaintiff were valued at the following prices:

(1) Kretam Holdings Berhad shares valued at RM1.640;

(2) Ramatex Berhad shares valued at RM3.720; and

(3) Tekala Corporation Berhad shares valued at RM2.230.

On 19 November 2003, the shares held by the plaintiff were valued at the following prices:

(1) Kretam Holdings Berhad shares valued at RM0.45 suspended;

(2) Ramatex Berhad shares valued at RM3.32; and

(3) Tekala Corporation Berhad shares valued at RM0.91.

It must be recalled that on 2 December 1998, at the first meeting, it was agreed that the defendant will dispose off the shares by way of a private arrangement through AMS. This agreement formed part and parcel of the first collateral agreement. Somehow when the plaintiff threatened to dishonour its obligation under the first collateral agreement, the parties met for the second time on 22 August 2000.

That meeting on 22 August 2000 constituted the second meeting and at that meeting it was agreed that the plaintiff would dispose off all the shares held by it as security. It was further agreed at the second meeting that after the disposal of all the shares the plaintiff would consider the defendant's request for a reduction in regard to the element of interest. This agreement constituted the second collateral agreement.

Now, it would be apparent from the recital of the facts that the plaintiff has breached its obligations under the first and the second collateral agreements and has caused the defendant to suffer loss and damage.

Section 92 of the Evidence Act 1950 does not absolutely bar the defendant from adducing evidence to prove the existence of the two collateral agreements (the first and the second collateral agreements as alluded to earlier). In *Eushun Properties Sdn Bhd & Ors v. MBf Finance Bhd* [1992] 3 CLJ 1519; [1992] 1 CLJ (Rep) 104, SC, Mohamed Yusoff SCJ writing for the Supreme Court had this to say:

We also agree with the learned judge that the two letters do not say clearly that the money disbursed were to be used to pay interest on the loan. But considering the amount and the dates of the drawdown on a quarterly basis shown in the two letters coincided with interest as due and payable under the loan militates against the granting of an O. 14 judgment, it is our view this should be left to the trial judge to determine whether in the circumstances of the evidence as a whole these contemporaneous letters would amount to prior written consent of the lender within the meaning of cl. 5.01(ii) of the agreement.

It is also our view that s. 92 of the Evidence Act 1950 ('the Act') does not absolutely bar the defendants from adducing evidence to vary the terms of formal agreement between the parties. As asserted in the affidavits of the defendants there had been negotiations between Kung Beng Hung, the previous general manager of the plaintiff on the purpose of the loan and the intent of the initial drawdown of the $1.5m on a quarterly basis. It is also averred by the defendants that when their true arrangement was not reflected in the agreement the defendants had raised certain queries and assurances were given by Kung to them.

These averments are questions of fact which cannot be determined on affidavit evidence alone. As demonstrated in the following authorities, evidence of surrounding circumstances and factual background are admissible, and that collateral agreement can exist side by side with the main agreement which it contradicts.

The law on collateral oral agreement is clearly spelt out in s. 92(b) of the Act. It is recognised as one of the exceptions to the general rule forbidding extrinsic evidence to be adduced to contradict, vary, add to or subtract from, the terms of an agreement which had been reduced into the form of a document. In *Keng Huat Film Co Sdn Bhd v. Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243, Mohd Azmi FJ (as he then was) said:

> For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, **evidence of surrounding circumstances and factual background have always been admissible.** (emphasis added.)

In another case, *Tan Swee Hoe & Co Ltd v. Ali Hussain Bros* [1980] 2 MLJ 16, which is generally considered as the leading authority on the matter, the appellants had orally agreed to allow the respondents to occupy the premises for as long as they wished upon payment of $14,000 as tea money. The written tenancy agreements were later executed by the parties but neither referred to the appellants' promise. A dispute arose between the parties and the appellants eventually sued for vacant possession. In their defence, the respondents claimed that under the oral agreement, they were entitled to stay as long as they wished and so long as they paid the rent regularly. The trial judge dismissed the appellants' claim and ordered them to register a lease in favour of the respondents for a term of 28 years. On appeal, it was argued for the appellants that evidence of the oral promise could not be given in view of ss. 91 and 92 of the Act. Dismissing the appeal, Raja Azlan Shah CJ (as he then was) held:

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty.
>
> In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contracts was made by Lord Moulton in *Heilbut Symons & Co v. Buckleton* [1913] AC 30, 47 … The case of *City and Westminster Properties (1934) Ltd v. Mudd* [1959] Ch 129 and the subsequent applications of it has, in our opinion, fortified this not unfamiliar doctrine. We think Lord Denning MR summarised it in *Dick Bentley Productions Ltd v. Harold Smith (Motors) Ltd* [1965] 1 All ER 65, 67:
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> > Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is *prima facie* ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

Indeed if it is found in the course of the trial, that the second collateral agreement was in existence just like what the defendant has throughout his affidavits maintained, then the plaintiff will be liable, partly if not wholly, for all the losses suffered by the defendant arising from the breach thereof. In my judgment, the two collateral agreements constituted triable issues that should go for full trial.

Non-disclosure Of Collateral As Well As The Particulars Of Sale Of The Shares

The plaintiff was guilty of non-disclosure. I must elaborate further.

The shares which the plaintiff held as at 7 December 1998 were as follows:

(a) Kretam Holdings Berhad amounting to 1,500,000 units;

(b) Tekala Corporation Berhad amounting to 1,200,000 units; and

(c) Ramatex Berhad amounting to 3,846,000 units.

Whereas the remaining shares held by the plaintiff as at 23 February 2001 were as follows (as per the plaintiff's evidence to which the defendant made no admission at all):

(a) Kretam Holdings Berhad at 1,092,000 units wherein 408,000 units were sold;

(b) Tekala Corporation Berhad at 929,000 units wherein 271,000 units were sold; and

(c) Ramatex Berhad at 1,557,000 units wherein 2,289,000 units were sold.

Now, from 7 December 1998 to 23 February 2001, the plaintiff has disposed almost 2.96 million units of the shares which the plaintiff held as security. But, surprisingly, this fact was not disclosed until the plaintiff was put to strict proof thereof. In the plaintiff's final affidavit in encl. 9 at para. 5, the plaintiff finally made disclosure of the sale of approximately 2.96 million units of the shares. In sharp contrast, in the plaintiff's first affidavit as seen in encl. 5 at para. 10 as well as in the plaintiff's statement of claim, the plaintiff has consistently maintained that none of the shares were ever sold and that all the shares were within and in the plaintiff's possession. It was obvious that the extent of the defendant's liability to the plaintiff would be dependent on the value obtained by the plaintiff for the sale of all the shares pledged to the security as security. As demonstrated there was a conflict of material evidence on the face of the plaintiff's own affidavits. Serious conflict of material facts in the plaintiff's affidavits gave rise to triable issues that merit a trial. So, I say that the plaintiff was not entitled to a final judgment at this point of time. In *Abdul Rahim bin Abdul Hamid & Ors v. Perdana Merchant Bankers Bhd & Ors* [2000] 2 CLJ 457, the Court of Appeal had this to say at p. 470 to p. 471 of the report:

The principle governing summary judgment under both rules are more or less the same. In a nutshell, in an application under O. 14 made by the plaintiff for summary judgment without trial, the general principles established are that the plaintiff has to satisfy the court that the defendant plainly and obviously has no defence to the plaintiff's claim or part of the plaintiff's claim. If the plaintiff is able to satisfy the court, then summary judgment should be entered in the plaintiff's favour. On the other hand, if the defendant can show that there is a serious conflict of material facts as disclosed in the opposing affidavits, or there is otherwise a triable issue worthy of judicial investigation in the trial of the action, or there is an important and difficult point of law requiring further and mature consideration at the trial, summary judgment should be refused.

Siti Norma Yaakob J (now FCJ) in *Oriental Bank Bhd. v. Jaafar Sidek b. Mohd Salam & 2 Ors.* [1990] 2 CLJ 72; [1990] 2 CLJ (Rep) 585 held that (see the headnotes):

Held:

[1] The defendants, as guarantors, are entitled to know the true extent of the principal borrower's liability as their own liability is secondary to that of the principal borrower.

[2] The presence of a conclusive evidence clause *per se*, cannot prevent the guarantors from questioning the correctness or otherwise of the account sought to be produced as conclusive evidence against them.

[3] There was no disclosure as to the amount realised from the sale of the pledged shares and as to when such shares were sold.

[4] Before clause 19 of the guarantee (the circumventing clause) can operate against the defendants the plaintiff must firstly as a condition precedent establish that any certificate it issues on the 1st defendant's indebtedness is correct and conclusive.

[5] As a result of the plaintiff's reluctance to disclose material facts, the Court decided to exercise its discretion to allow the defendants application for further and better particulars.

In the body of the judgment, Siti Norma Yaakob J (now FCJ) even went to the extent of stating that the particulars of the shares held, sold and the amount realised by the plaintiff should have been particularised in the statement of claim. At p. 73 of the report, this was what the learned judge said:

> The pledged shares have already been sold by the plaintiff but the plaintiff is most reluctant to divulge the particulars of sale or the amount realised when asked by the defendants and neither is the fact that pledged shares had also formed part of the securities or their sale, pleaded in the Statement of Claim. I consider that as guarantors, the defendants are entitled to know the true extent of the principal borrower's liability for after all, their own liability is secondary to that of the principal borrower. Moreover, unlike the normal run of things, where the principal borrower is a company and the guarantors its directors, the principal borrower in this case is a private person who benefited solely from the overdraft and whose dealings with the plaintiff may well be conducted without any conceivable knowledge of the defendants.

and I fully subscribe to her views. Incidentally, the principles of law enunciated in the *Oriental Bank*'s case were cited and applied by the Court of Appeal in *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690.

Here, the defendant has challenged the certificate of indebtedness and so the plaintiff was duty bound to prove to this court the true extent of the defendant's liability particularly in regard to the application of the monies obtained from the sale of the pledged security. In the words of Siti Norma Yaakob J (now FCJ) in the *Oriental Bank*'s case as seen at p. 74 of the report, the plaintiff was duty bound to prove the indebtedness of the defendant since the certificate of indebtedness was challenged:

> For the clause to operate against the defendants, the plaintiff must first establish that any certificate it issues on the 1st defendant's indebtedness can be accepted as correct and I consider that this is a condition precedent which must be fulfilled by the plaintiff. In this case, the defendants have given me good reasons to question the accuracy of the plaintiff's certificate issued under clause 19, and under such circumstances I consider that the certificate can no longer be regarded as being conclusive as evidence against the defendants in these proceedings.

In an attempt to discharge the burden, the plaintiff has relied on the documents as found in exh. "ABB13" of encl. 7. But, with respect, they were insufficient. Even the contract notes as exhibited in encl. 17 failed to reflect the sale of the 2.96 million units of shares. In my judgment, the plaintiff has failed to discharge its burden. The defendant urged this court to recognise that the alleged indebtedness as set out in the certificate of indebtedness to be inaccurate, manifestly erroneous and excessive in the extreme. I agree with these salient submissions of the defendant. Final judgment without a trial should not be accorded to the plaintiff.

The Majid Account

Sometime on or around 31 October 1996 the defendant had instructed the plaintiff to settle the account for Mr. Abdul Majid bin Omar amounting to RM4,003,150.68 in Arab-Malaysian Merchant Bank Berhad ("the Majid account"). The Majid account was settled primarily from funds obtained from the overdraft facilities of the defendant with the plaintiff. The Majid account was secured with 1914955 units of Ramatex Berhad shares which were held by Mr. Abdul Majid bin Omar on trust for the defendant and were transferred to the plaintiff as further security to secure the overdraft facilities. The plaintiff did not disclose all these facts for the purpose of its final judgment application and the plaintiff even denied being in receipt of the Ramatex Berhad shares. The truth will always prevail and by letter dated 18 October 1996, the plaintiff wrote to Arab-Malaysian Merchant Bank Berhad to re-execute the transfer forms pertaining to the Ramatex Berhad shares. In my judgment, pending further enquiry and disclosure by the plaintiff, it would be next to impossible to determine what has happened to the Ramatex Berhad shares. That would, in my judgment, constitute triable issue fit for adjudication.

Breach Of The Banking And Financial Institutions Act 1989 ("BAFIA") And The Guidelines Issued By Bank Negara Malaysia ("BNM Guidelines")

The plaintiff has admitted that the purpose of the OD4 in the sum of RM12,307,200 which was granted to the defendant was to enable the latter to service the interest in respect of his other accounts with the plaintiff.

I am of the considered view that the grant and the subsequent approval of the OD4 – the fourth overdraft facility, for RM12,307,200 was in breach of reg. 28 of the BNM guidelines. On 17 April 1996 there was an outstanding balance of RM7,204,255.10 outstanding under OD1, OD2 and OD3. The approval limit of OD1, OD2 and OD3 was in the sum of RM7.02 million. Notwithstanding all these, on 4 September 1996, the plaintiff granted and approved OD4 for a further sum of RM12,307,200 to service the interest in respect of the defendant's other accounts with the plaintiff. This was all done in breach of reg. 28 of the BNM guidelines which stipulates as follows:

> 28. Where a financial institution grants a loan and the loan subsequently turns non-performing, the same financial institution or other institutions in the same group is not allowed to grant new credit, by way of a loan or debt instrument, to the defaulting borrower to settle the arrears. If the business of the borrower is still deemed to be viable, the financial institution should reschedule or restructure the loan.

It cannot be doubted that the BNM guidelines were put in place in order to prevent any debt from spiralling out of control. It is a matter of policy and it is for the good of the country that all the banks in the country should adhere to the BNM guidelines since Bank Negara being the Central Bank is the regulatory body entrusted to put in place and implement the minimum standards for classification of accounts, income recognition and loan loss provisioning. The BNM guidelines are issued pursuant to s. 126 of the BAFIA and it has the force of law. And as to whether s. 25 of the BAFIA is applicable to the facts of the present case, it must remain an issue of law to be determined at the trial proper.

Breach Of The Duty Of Care

I say that the plaintiff has breached its duty of care which it owed to the defendant. From the facts, it would be apparent that the plaintiff adopted a cavalier attitude towards the defendant especially in regard to the manner in which the shares were disposed off. It seems to me and this was the submission of the defendant that if the plaintiff had acted on the second collateral agreement and disposed off the shares on 22 August 2000, the amount outstanding today would only be a fraction of the claim. In fact, if the plaintiff had disposed off the shares on 22 August 2000, the monies obtained from the sale of the shares then would have extinguished the defendant's debt in principal with the plaintiff. And if that were to happen then the only issue left outstanding would be the rebate on the interest.

The Case Of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 212, PC

This case was heavily relied upon by the plaintiff. Notwithstanding the fact that I am in total agreement with the proposition of the law laid down in this case, yet factually speaking the facts in that case are poles apart from the present case.

In *Eng Mee Yong*'s case, the appellant there agreed to sell a piece of land to the respondent. Later, the appellant terminated the agreement because the respondent refused to pay the balance of the purchase price. The respondent entered a caveat on the land thereby effectively preventing the appellant from dealing with it. In deciding whether or not to allow the removal of the caveat, the court had to determine whether on the available evidence presented the respondent, as a caveator, must satisfy the court that his claim to an interest in the property did raise a serious question to be tried and having done so, the respondent must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action by preventing the appellant caveatee from disposing off the land to some third party. Whilst

considering the affidavits filed by the parties, the court was of the view that the affidavit filed by the respondent lacked credence for the following reasons:

(1) in the first part of the affidavit, the respondent affirmed that "time was not of the essence of the sale and purchase agreement";

(2) subsequently, the respondent went on to state that the appellant granted the respondent "an extension of time for a period of two months";

(3) but, unfortunately, there was nothing in the affidavit to indicate how, when, where and between whom and on what terms and what was the consideration for the grant of the purported extension; and

(4) to aggravate the matter further, the respondent never attempted to make any payment upon expiry of the two months' extension.

In sharp contrast, the facts in the present case before me may be stated in this way. Here, I am dealing with an application for final judgment. The onus placed on the defendant, at this point of time, is only to show that there are triable issues and that the matter cannot be decided on affidavit evidence alone. The defendant too may even show that there should be a trial for some other reason. Here, before me, the defendant has indicated how, when, where and between whom and on what terms the second collateral agreement was entered into. In addition to that, the letter to the plaintiff from the defendant dated 23 August 2000 constituted proof that there was a meeting wherein the credit facility was discussed. Although both the parties were not in agreement as to what was agreed at the meeting, one can surely acknowledge that there was a meeting and that the settlement of the credit facility was discussed.

Conclusion

It was part and parcel of my judgment that this was not a fit and proper case for summary judgment. Triable issues have been set out in this judgment and they require an in depth inquiry and further scrutiny.

It must be recalled to mind that the first and the second collateral agreements were reached between the parties through Mr. Khalil and Mr. Mohd Azlam, yet neither of them has affirmed an affidavit in these proceedings to confirm or refute the existence of those agreements.

The following pertinent questions must be raised:

(a) what was agreed at the meetings on 2 December 1998 and 22 August 2000?;

(b) why was Mr. Yap Ghee Choo absent at the second meeting bearing in mind that it was he who had called for the meeting?

(c) why were the plaintiff's version and the defendant's version on the matters that were agreed on in these meetings contradictory?;

(d) what was the actual amount of shares held by the plaintiff as security for the overdrafts?;

(e) at what price these shares were disposed off?;

(f) what happened to the Ramatex Berhad shares?;

(g) why did the plaintiff deny that it had disposed off any of the shares in encls. 1, 4 and 7?;

(h) why did the plaintiff only disclose the amount of shares it disposed off in encl. 9?;

(i) why did the plaintiff fail to particularise the price at which the shares were disposed off and how were the monies derived thereto being applied?;

(j) did the plaintiff breach its duty of care owed to the defendant?; and

(k) if the answer is in the affirmative, how does the court apportion liability at this stage?

What Megarry J said in *Miles v. Bull* [1968] 3 All ER 632, at 637 should be reproduced here:

> Under rule 3 and rule 4 of the present R.S.C. Order 14, the defendant can obtain leave to defend if … the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most of all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her.

I gratefully adopt the above quoted passage to the case at hand. This meant that the plaintiff was not entitled to final judgment. This also meant that the defendant's appeal in encl. 10 should be allowed with costs.